

No. 42886-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN M. LUNDY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Thomas McPhee, Judge
Cause No. 09-1-00576-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether it was error for the trial court to impose legal financial obligations without discussing on the record whether Lundy had the present or future ability to pay them.

B. STATEMENT OF THE CASE.

The State accepts Lundy's statement of the case.

C. ARGUMENT.

The trial court did not err in imposing legal financial obligations. The fact that there was no discussion on the record does not mean that the judge did not consider Lundy's financial situation, and there was substantial evidence in the record to establish that Lundy had the ability to pay the obligations. Further, Lundy has recourse if the State attempts to collect any of the legal financial obligations at a time he cannot pay them.

The State does not dispute that Lundy can raise the issue of his legal financial obligations in this appeal. The trial court readdressed the legal financial obligations on remand and made a discretionary decision about them, and thus the matter can be reviewed by an appellate court even though it was not raised in the earlier appeal nor addressed by the appellate court at that time. State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). Therefore, the State will not respond to Lundy's argument about ineffective assistance of appellate counsel on the original appeal.

The State does, however, dispute that the trial court erred in imposing the legal financial obligations for which Lundy is responsible.

a. The legal financial obligations imposed by the court.

Except for the amount of jury costs, the legal financial obligations imposed on remand are the same as those imposed in the original judgment and sentence. CP 22, 60. Those costs include: (1) \$554.53 in restitution, (2) a \$500 victim assessment, (3) court costs of \$793.30, which includes a \$200 filing fee, \$343.30 in witness costs, and a \$250 jury fee, and (4) a DNA collection fee of \$100. The total is \$1,947.82. CP 60.

b. Statutory authority for legal financial obligations.

Restitution is provided for in RCW 9.94A.505(7) and 9.94A.753. “Restitution *shall* be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property . . . *unless* extraordinary circumstances exist which make restitution inappropriate in the court’s judgment” RCW 9.94A.753(5), in part, emphasis added. Subsection (4) of that section specifies that “[t]he court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.”

A crime victim assessment is required by RCW 7.68.035.

When any person is found guilty in any superior court of having committed a crime, [other than certain motor vehicle crimes], there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a). Subsequent sections of this statute direct the collection and disbursement of this money to assist victims of crime.

Court costs are allowed by RCW 10.01.160 and 9.94A.760(1). "The court *may* require a defendant to pay costs." RCW 10.01.160(1), emphasis added. Costs are limited to the expenses the State specifically incurred in prosecuting the defendant's case. RCW 10.01.160(2). Because the term "costs" refers to expenses incurred by the State, restitution and victim assessments would not be included as "costs." RCW 10.46.190 provides that a person convicted of a crime is liable for the costs of the proceedings against him, including a jury fee "as provided for in civil actions." RCW 36.18.016(3)(b) allows a jury demand fee of \$250 for a jury of twelve in criminal cases, the same amount as

allowed in RCW 36.18.016(3)(a) for civil cases. The court is directed to take into account the financial resources of the defendant and not order costs if the defendant cannot pay them. RCW 10.01.160(3).

A fee for DNA collection is required by RCW 43.43.7541: “Every sentence imposed for a crime specified in RCW 43.43.754 *must* include a fee of one hundred dollars.” (Emphasis added.) All other financial obligations take precedence and the DNA collection fee is the last to be collected, but it is mandatory. The fee is a “court-ordered legal financial obligation as defined in RCW 9.94A.030.” RCW 43.43.7541. RCW 9.94A.030(29) provides, in part, that a “legal financial obligation” is an amount of money ordered by the court and may include restitution, crime victims’ compensation fees, court costs, drug funds, attorney fees, costs of defense, fines, and “any other financial obligation that is assessed to the offender as a result of a felony conviction.”

The sentencing court retains jurisdiction to enforce the legal financial obligations, for crimes committed after July 1, 2000, until they are satisfied, even if that exceeds the statutory maximum for the crime. RCW 9.94A.760(4).

c. Statutory relief.

A defendant always has the opportunity to seek relief from legal financial obligations.

RCW 10.01.160(4): A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

If a court finds at a later time that the costs will impose a manifest hardship, it has the authority to modify the monetary obligations. State v. Curry, 118 Wn.2d 911, 914, 829 P.2d 166 (1992). Courts may refuse to address a request for remission until the State attempts to collect the financial obligations. State v. Bertrand, 165 Wn. App. 393, 405, 267 P.3d 511 (2011).

d. Standard of review

A trial court's determination of a defendant's resources is a factual one and is reviewed under the "clearly erroneous" standard. Balancing the defendant's ability to pay against the amount of the obligation is a matter of judgment, and reviewed for an abuse of

discretion. State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991).

Formal findings of fact are not required when the sentencing court imposes court costs. State v. Curry, 62 Wn. App. 676, 680, 814 P.2d 1252 (1991), *affirmed* 118 Wn.2d 911, 829 P.2d 166 (1992); State v. Suttle, 61 Wn. App. 703, 714, 812 P.2d 119 (1991) (when the right to counsel is not impacted); State v. Eisenman, 62 Wn. App. 640, 646, 810 P.2d 55 (1991); Bertrand, 165 Wn. App. at 404 (although there must be a sufficient record to permit review); State v. Phillips, 65 Wn. App. 239, 243, 828 P.2d 42 (1992) (failure to enter formal findings before imposing costs not a constitutional error that requires resentencing). Lundy's counsel was retained, and no court-appointed attorney fees were imposed. CP 60, 02/04/10 RP 22-23.

A separate analysis is required when considering the different obligations imposed on the defendant. Baldwin, 63 Wn. App. at 309.

e. Restitution.

Restitution is mandatory. It may be modified as to "amounts, terms, and conditions," but the court "may not reduce the total amount of restitution ordered because the offender may lack the

ability to pay the total amount.” RCW 9.94A.753 (4). Even if the failure to pay is not willful, the court may not grant relief. State v. Bower, 64 Wn. App. 808, 813, 827 P.2d 308 (1992). It follows, therefore, that the court need not consider the defendant’s ability to pay when imposing restitution.

f. Victim assessment.

The victim assessment of \$500 is mandatory. Curry, 118 Wn.2d at 917; Suttle, 61 Wn. App. at 714; Eisenman, 62 Wn. App. at 646 (victim assessment is not a “cost”); Bower, 64 Wn. App. at 812. As such, it follows that the defendant’s financial circumstances are irrelevant.

g. DNA collection fee.

The imposition of a \$100 DNA collection fee is mandatory, and has been since June 12, 2008. RCW 43.43.7541, State v. Thompson, 153 Wn. App. 325, 336, 338, 223 P.3d 1165 (2009). Therefore, Lundy’s ability to pay was irrelevant to the imposition of that amount.

h. Court costs.

This category includes the filing fee, witness costs, and a jury demand fee, and it is the only category applicable to Lundy which implicates the court’s discretion. The amount at issue is

\$793.30. CP 60. As discussed above, the court is not required to make formal findings, but is required to take into account the defendant's financial circumstances.

Lundy's argument assumes that because the court made no remarks on the record it did not consider his financial resources. That does not necessarily follow. One can reasonably assume that many thoughts pass through the mind of a judge but do not come out of his or her mouth. The record establishes that the court had ample reason to find that Lundy had, and will have, the ability to pay this nominal amount.

At the original sentencing on February 4, 2010, Lundy told the court that in 2004, a year when he was out of prison and sober, he made \$100,000. 02/04/10 RP 14. He is a young man, 34 years old at that time. 02/04/10 RP 16. He stated a desire for treatment and to return to the community as a productive citizen. 02/04/10 RP 17. He paid for his own attorney. 02/04/10 RP 22-23. He had anticipated that his wife would be at sentencing and would write a check to cover all of the fines that day. 02/04/10 RP 23-24. She apparently had been told the wrong time for the sentencing hearing and was not there. 02/04/10 RP 15.

At the resentencing hearing following remand, on November 10, 2011, Lundy agreed to the same sentence he had before, noting the reduction in jury costs. 11/10/11 RP 11. He again told the judge how well he did in the community until he became a drug addict, and that he was attending classes in prison in an effort to change his life. 11/10/11 RP 12. The court found no basis for changing the original sentence except for reducing the jury fee. 11/10/11 RP 13.

Based on the information presented to the court by Lundy himself, how could the court not find that he had the ability to pay a total of \$1,947.82 over the remainder of his life? While the court may not have stated the reasons on the record, it certainly was not an abuse of discretion to impose \$793.30 in costs, the only financial obligations over which the court had discretion. Lundy cites to State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005), for the proposition that a failure to exercise discretion in sentencing is reversible error. That case, however, concerned a sentencing court that refused to grant a Drug Offender Sentencing Alternative (DOSA) sentence, apparently on grounds that the program was so underfunded as to be useless. That is entirely different from imposing less than \$800 in discretionary costs without stating the

reason on the record. Lundy has not shown that failure to state the reasons for exercising discretion is a failure to exercise discretion. The Judgment and Sentence sets forth in writing that the court considered Lundy's financial status, and the judge did not strike out that paragraph. CP 59. The record does not support Lundy's argument.

i. Lundy will have avenues for seeking relief if the State attempts to collect the legal financial obligations at a time he is unable to pay them.

Even if the court did impose legal financial obligations without considering Lundy's financial circumstances, he has suffered no prejudice. Where there is no prejudice, the error is harmless.

Challenges to sentencing conditions are not ripe for review until the State attempts to enforce them.¹ With respect to financial obligations, the relevant question is whether the defendant is unable to pay them at the time the State attempts to collect them, and whether the State seeks to impose sanctions for nonpayment. State v. Sanchez Valencia, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010). It is difficult for a sentencing court to make any realistic

¹ The State understands that Lundy is challenging the procedure by which the costs were imposed, not the costs themselves, but this discussion is relevant to his lack of prejudice.

prediction about a defendant's ability to pay costs several years down the road when he is released from prison. "[T]he meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation." Baldwin, 63 Wn. App. at 310.

RCW 10.01.160(4) provides a mechanism by which a defendant who is "not in contumacious default" of his legal financial obligations may seek remission for some or all of the costs. As noted above, he may not avoid restitution, the victim penalty assessment, or the DNA collection fee.

Through this procedure the defendant is entitled to judicial scrutiny of his obligation and his *present* ability to pay at the relevant time. In contrast, the inquiry at sentencing as to *future* ability to pay is somewhat speculative

Baldwin, 63 Wn. App. at 311, emphasis in original. See also, Bower, 64 Wn. App. at 813, Curry, 118 Wn.2d at 914, Bertrand, 165 Wn. App. at 405.

Lundy notes that he was found indigent for purposes of this appeal. Appellant's Opening Brief at 3, CP 89-92. Two of the defendants in Curry argued that the orders finding them indigent for purposes of appeal were sufficient evidence that they could not pay their financial obligations. The court said:

We disagree. The costs involved here are on a different scale than the costs involved in obtaining counsel and mounting an appeal. . . . It is certainly within the trial court's purview to find that the defendants could not presently afford counsel but would be able to pay the minimal court costs at some future date.

Curry, 118 Wn.2d at 915, n. 2.

Lundy has shown no prejudice from the court's failure to make a specific record of the reasons it chose to impose the discretionary portion of his legal financial obligations. Indeed, he has not shown that the court did not take his financial circumstances into consideration; the judgment and sentence says that it did.

Lundy asks this court to remand his judgment and sentence with an order to strike paragraph 2.5 of his judgment and sentence. CP 59. He does not ask the court for a resentencing or that the costs themselves be stricken, although presumably one or the other is the logical result.


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D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm the imposition of costs in this matter.

Respectfully submitted this 24th day of May, 2012.



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May 24, 2012 - 2:17 PM

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